



Steven L. Beshear  
Governor

Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF ADMINISTRATIVE SERVICES**  
Room 183, Capitol Annex  
702 Capital Avenue  
Frankfort, KY 40601-3462  
(502) 564-5781  
Fax (502) 564-4279

Jonathan Miller  
Secretary

Robin Kinney  
Executive Director

February 19, 2010

**No. 09-42**

Robert W. Michel  
Major Accounts Manager  
Signature Technology Group, Inc.  
2424 W. Desert Cove  
Phoenix, Arizona 85029

RE: Determination of Protest: RFP 758 0900000174 (Enterprise Hardware Maintenance).

Dear Mr. Michel:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the solicitation RFP 758 0900000174 for Enterprise Hardware Maintenance (the "RFP"). In this protest Signature Technology Group, Inc. ("STG") contends that (1) the RFP requirements in Section 30.010 are unduly restrictive and (2) the RFP's pricing model is not a fair method upon which to make an award. For the reasons stated herein, this protest is sustained in part and denied in part.

### **FACTUAL BACKGROUND**

The Finance Cabinet Office of Procurement Services ("OPS") issued the RFP on December 7, 2009. The RFP was modified on December 16, 2009, to respond to vendor questions.

On December 22, 2009, STG filed a written protest with the Secretary of the Finance Cabinet. On January 26, 2010, OPS provided a written response.

## **DETERMINATION**

After a review of the solicitation, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. STG was a prospective offeror to the RFP so it has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the basis for STG's protest was only apparent upon the first amendment to the RFP on December 16th. The written protest was received on December 22<sup>nd</sup>. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

This solicitation is to be conducted under the competitive negotiation process at KRS 45A.085. In contrast to competitive sealed bidding under KRS 45A.080, the competitive negotiation process is intended to offer the buying agency more flexibility in drafting the content of the solicitation document and more flexibility in evaluating the resulting offerors. *See, e.g., Matter of: A & C Building and Industrial Maintenance Corporation* 88-1 CPD ¶451 (Comp.Gen. 1988).

When reviewing a competitive negotiation solicitation, legal requirements will be evaluated on a "contrary to law" basis, that is, the inquiry will be whether the solicitation meets the requirements of law. Discretionary determinations will be evaluated on an "arbitrary or capricious" standard, that is, the inquiry will be whether the agency's determination is irrational. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

The protester bears the burden of proof. *See Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) ("protester has burden of demonstrating the merits of its case."); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). In sum, the Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. *See Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act).

Accordingly, the Secretary will review the solicitation to determine whether the questioned terms and conditions have a rational basis and whether such terms and conditions are in accordance with law.

**1. The RFP requirements in Section 30.010 are unduly restrictive.**

STG contends the vendor requirements in the RFP are arbitrary and capricious. Section 30.010 of the RFP provides:

The vendor shall be certified to perform warrantee [sic] service for IBM, EMC, Sun, HP, Dell, Lexmark, and Xerox.

In the Second Amendment to the RFP, OPS answered vendor questions. In specific:

Question 10: It does not state anywhere in the RFP documents if the service that will be supplied by the vendor will be all post-warranty support or not. Please clarify.

Commonwealth Response: The Commonwealth expects a majority of the service supplied by the vendor to be post warranty.

This RFP seeks to establish a contract for post-warranty service. Yet, the RFP requires offerors to be certified to perform warranty service. STG points out that the equipment manufacturers themselves will provide warranty repairs, if necessary. In its written response, OPS agrees that the RFP requirement cited above is not appropriate.

The Secretary finds that the RFP requirement in Section 30.010 that an offeror be certified to perform warranty repairs is unduly restrictive. Accordingly, this ground of protest has merit and the protest, on this ground, is sustained.

**2. The RFP's pricing model is not a fair method upon which to make an award.**

STG alleges that "the prices submitted do not lock the winning vendors into offering equally discounted prices on the actual inventory of equipment that will be put in formal supply contracts." STG notes that the Commonwealth uses numerous models of color laser printers but that the RFP sought pricing for only a single model. STG is concerned that a vendor might underbid a price for the specified printer and then charge vastly more for non-specified models.

OPS responds that the individual prices are sought for evaluation purposes. It would be difficult or impossible to provide a complete listing of equipment. Once the proposals submitted in response to the RFP are evaluated, a final contract will include a complete catalog of the vendor's prices.

The "competitive negotiation" process is intended to offer to Commonwealth flexibility. *See, e.g., Matter of: A & C Building and Industrial Maintenance Corporation* 88-1 CPD ¶451 (Comp.Gen. 1988). Nevertheless, the solicitation document "shall indicate the relative importance of price and other evaluation factors." KRS 45A.085(5). Then, "[w]ritten or oral discussions shall be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award." KRS 45A.085(7). Finally, an award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals. KRS 45A.085(6).

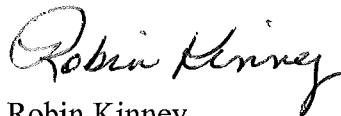
In this case, the offerors initially offer prices to provide a basis for evaluation. Discussions and/or negotiations are then conducted with offerors which have submitted "proposals determined in writing to be reasonably susceptible of being selected for award." Then an award is made "to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals." Here, the solicitation process is in conformance with KRS 45A.085. This ground for protest, therefore, is without merit.

Accordingly, upon review of the record, STG has demonstrated an error in the solicitation. The protest, therefore, must be **SUSTAINED**. The Finance Cabinet Office of Procurement Services is directed to rescind the RFP or to amend it in accordance with this Determination. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary  
Finance and Administration Cabinet  
By Designation

A handwritten signature in black ink, appearing to read "Robin Kinney", written in a cursive style.

Robin Kinney  
Executive Director  
Office of Administrative Services

cc: Stephanie R. Williams, OPS